

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF NORTH CAROLINA  
CHARLOTTE DIVISION

IN RE: )  
 )  
GARLOCK SEALING TECHNOLOGIES )  
LLC, et al, ) No. 10-BK-31607  
 )  
Debtors. ) VOLUME V-C  
 ) LATE AFTERNOON SESSION

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TRANSCRIPT OF ESTIMATION TRIAL  
BEFORE THE HONORABLE GEORGE R. HODGES  
UNITED STATES BANKRUPTCY JUDGE  
JULY 26, 2013

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P R O C E E D I N G S

JULY 26, 2013, COURT CALLED TO ORDER 3:35 P.M.:

LATE AFTERNOON SESSION:

THE COURTROOM IS NOW BACK OPEN TO THE PUBLIC:

THE COURT: Mr. Guy.

MR. GUY: Thank you, Your Honor.

Your Honor, if I may approach, I have some demonstratives.

THE COURT: Okay.

MR. GUY: Before I call Mr. Radecki to the stand, I would like to put this in context, because it's coming out of turn.

Each of the estimation experts in this case has forecast liabilities up to 20 -- 2050 for the asbestos claims, and each of them has used an inflation rate and a discount rate. And Mr. Radecki has assisted our expert, Dr. Rabinovitz, in calculating that rate. That's what we're going to talk about now.

We appreciate the courtesies of the court and the courtesies of the debtors and the ACC for allowing us to present Mr. Radecki out of turn.

I call to the stand Mr. Radecki.

1 JOSEPH J. RADECKI,  
2 Being first duly sworn, was examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. GUY:

5 MR. GUY: Your Honor, we've committed to be done in  
6 under an hour. So you're going to watch me go through this  
7 very quickly, so Mr. Cassada can get back to his case.

8 Q. What is your name, sir?

9 A. Joseph Radecki.

10 Q. Where do you currently work?

11 A. Lincoln International.

12 Q. What kind of company is that?

13 A. It's a global investment bank that focuses on the mid  
14 market.

15 Q. What do you do at Lincoln, sir?

16 A. I'm an investment banker.

17 Q. What is your position at Lincoln?

18 A. Managing director, head of our special situations groups,  
19 and one of the eight managing partners of the firm.

20 Q. Are you acting as a financial adviser to the FCR in this  
21 case?

22 A. I am.

23 Q. When was your retention approved by Judge Hodges?

24 A. I believe in December 2010.

25 Q. In connection with your retention outside of your expert



1 report which we're going to get to in a minute, what is it  
2 that you do, generally, for the FCR?

3 A. I respond to him on all the financial aspects of the  
4 case-valuation, financial results, and analysis of such,  
5 analysis of historical results, projections, et cetera.

6 THE COURT: Excuse me, Mr. Guy. I forgot to  
7 announce that we're kind of back open for anybody that wants  
8 to come in. So I presume there's nobody out in the hallway.

9 MR. GUY: No, Your Honor. I think the folks came  
10 back in.

11 THE COURT: Okay. Good.

12 MR. GUY: We obviously have no objection to this  
13 being open to the public.

14 BY MR. GUY:

15 Q. You were asked by the FCR's counsel to prepare an expert  
16 report for the purposes of this estimation trial?

17 A. I was.

18 Q. And what were you asked to do?

19 A. To prepare an expert report on the appropriate inflation  
20 and discount rates to be utilized by the FCR's estimation  
21 expert in the calculation of the mesothelioma claims.

22 MR. GUY: And, Your Honor, the parties in this case  
23 have agreed that the finance experts, that would be Dr. Snow,  
24 Dr. McGraw and Mr. Radecki are qualified for purposes of their  
25 testimony so that will short circuit it. But I do want to ask

1 him preliminary questions, just so the court can feel  
2 comfortable with Mr. Radecki and talk with him about these  
3 issues.

4 Q. What does your work entail, sir?

5 A. All aspects of investment banking, including M&A work,  
6 special situations, which is our work with distressed  
7 companies or the creditors of distressed companies in  
8 evaluating their capital structures, lots of valuation work,  
9 as well as debt advisory, which is largely working on the debt  
10 portions of capital structures.

11 Q. How long have you held your current position?

12 A. Coming up on four years.

13 Q. Can you give the court a very quick overview of what you  
14 did before your current job at Lincoln?

15 A. I've been in investment banking or the securities  
16 industries and investment banking for about 33 years. Started  
17 my career at Merrill Lynch. I was in the Capital Markets  
18 Group at Drexel Burnham Lambert for seven years. Thereafter I  
19 ran the Restructuring and Special Situations Group at  
20 Jefferies and Company for eight years, held the same position,  
21 running the Financial and Restructuring Group of CIBC World  
22 Markets for eight years. Held the same position at Piper  
23 Jaffray and Company for two years. And then had my own firm,  
24 Tre Angeli, LLC. I was there for a year and a half before we  
25 ultimately merged that firm into Lincoln.

1 Q. Can you explain to the court why an understanding of  
2 inflation is important to you in your work?

3 A. It touches upon all the companies we deal with, their  
4 cash flows, and our ability to both value them and craft  
5 capital structures that makes sense for them.

6 Q. And the same question for discount rates.

7 A. Discount rates impact all of our valuation information,  
8 because we're required to take a look at future cash flows,  
9 and terminal -- what we call terminal values of companies in  
10 the future, and discount them back so we understand where that  
11 company is situated today.

12 Q. And obviously the court knows what net present value is.  
13 But can you explain whether you use net present value as a  
14 concept regularly in the work?

15 A. Yes, we do. The net present value is the actual value as  
16 of today of the discounted cash flows and/or asset values.

17 Q. And is the methodology that you use for calculating net  
18 present value, is that going to be fundamentally different  
19 when you're looking at a future payment stream in relation to  
20 tort claims?

21 A. The methodology, no, won't be any different.

22 Q. You are not an academic, correct?

23 A. No, I am not.

24 Q. And you haven't written any peer-reviewed articles on  
25 finance or economics, correct?

1 A. Written articles, but we don't have peer review in our  
2 industry, no.

3 Q. So your expertise is primarily based on your work  
4 experience?

5 A. Yes.

6 Q. Have you ever testified in court?

7 A. Many times, yes.

8 Q. What are the sorts of cases where you've testified?

9 A. Predominantly bankruptcy cases.

10 Q. And do you testify only on behalf of future claimants  
11 representatives?

12 A. No. No, not at all.

13 Q. Do you work with debtors?

14 A. Actually the majority of my work is with debtors.

15 Q. And do you work with creditor's committees?

16 A. I've handled many creditor committees assignments, both  
17 ad hoc and the official creditor committees.

18 Q. What percentage of your work would you estimate in recent  
19 years would be for future claims representatives?

20 A. Very small percentage, probably under 10, 15 percent.

21 Q. Have you been qualified as an expert witness by any court  
22 in any case?

23 A. Yes, many times.

24 Q. What areas of expertise were you qualified?

25 A. Again, primarily bankruptcy-related, as it relates to

1 valuation, debt structures, and guarantees, methodologies for  
2 calculation of various valuing -- valuing various assets of  
3 various companies, DIP financings and, you know, other  
4 bankruptcy related topics.

5 Q. And does your testimony ever touch on net present value  
6 issues?

7 A. Almost always all the valuation work almost always  
8 involves some form of net present value.

9 MR. GUY: Your Honor, at this point I offer  
10 Mr. Radecki as an expert in determining appropriate inflation  
11 and discount rates for net present value calculations.

12 DEBTOR: No objection, Your Honor.

13 THE COURT: We'll accept him as such.

14 MR. GUY: Thank you, Your Honor.

15 Q. Can you explain to the court why it's important -- why  
16 it's necessary to adjust future claims for the effects of  
17 inflation, something that all the estimation experts have done  
18 in this case?

19 A. Yeah. Sure. Inflation is obviously an important  
20 concept. The value of goods and services inflates over time,  
21 and it's important to understand how that's going to effect  
22 flows of -- streams of cash flow.

23 Q. Can you explain why it would be necessary to discount  
24 those claims?

25 A. Obviously a dollar at some point out in the future is

1   worth less than a dollar today. Accordingly, you need to make  
2   that appropriate adjustment to bring that value back to  
3   current debt (sic).

4   Q.   Mr. Radecki, before I ask you your opinions, did you come  
5   to this case trying to justify a particular inflation rate or  
6   a particular discount rate?

7   A.   No.

8   Q.   Have you relied on objective data in determining the  
9   appropriate inflation rate and discount rate in this case?

10   A.   Yes, I believe so.

11   Q.   I want to turn now to the inflation rate. Have you  
12   formed an opinion about the appropriate inflation rate that  
13   was used for purposes of future claims against Garlock?

14   A.   I have.

15   Q.   What is that opinion, sir?

16   A.   The opinion, I think it's up on the demonstrative, is  
17   that inflation rate that we utilized is 1.6 percent for 2010;  
18   1 percent for 2011; 1.4 percent for 2012; 1.7 percent for  
19   2013; 1.9 percent for 2014; and 2015 and thereafter,  
20   2.3 percent annually.

21   Q.   Mr. Radecki, why did you consider those particular years?  
22   What's the significance there?

23   A.   Well, we considered all the years throughout the claim  
24   distribution that we were provided by Dr. Rabinovitz, but the  
25   earlier years were especially important because of the

1 front-end loaded distribution of the claims.

2 Q. Where did you derive those actual rates?

3 A. I actually got those inflation rates from the  
4 Congressional Budget Office.

5 Q. And what do they represent? Is it ordinary CPI, or any  
6 special form of CPI W or CPI U?

7 A. No. The general consumer price index rates, as projected  
8 by the CBO.

9 Q. Why did you use the general CPI rate?

10 A. I think it's the best basket of goods and services with a  
11 wide geographic dispersal, you know, part of what we're  
12 evaluating here is compensatory claims, includes things like  
13 medical costs or lost wages. And the CPI is generally  
14 considered sort of the gold standard of inflation rates, the  
15 headline rate, so to speak.

16 Q. The CBO isn't the only entity that produces inflation  
17 forecasts, correct?

18 A. No, they're not.

19 Q. Why did you rely on the CBO as opposed to using other  
20 inflation forecasts?

21 A. I think the CBO's rates are generally well-respected and  
22 reliable. It's a source that's considered objective and  
23 nonpartisan.

24 Q. Why did you start your inflation rates in 2010 seeing as  
25 we're now in 2013?

1 A. Yeah. Obviously the claim distribution started in 2010,  
2 around -- obviously with the debtors' filing.

3 Q. Can you explain to the court why the rates vary in those  
4 early years?

5 A. Inflation rates constantly vary from month to month and  
6 year to year. Obviously the CBO researchers who put this  
7 together were expecting certain dynamics inside the U.S.  
8 economy to change the interest rates over those years.

9 Q. So from 2015 up to the end of the forecast period, we  
10 have the same rate, 2.3 percent?

11 A. Yes, we do.

12 Q. If you use the higher inflation rate, would that mean  
13 that future claims would be greater?

14 A. Yes. If we had inflated the claims at a greater rate,  
15 yes, the ultimate result would be a bigger number.

16 MR. GUY: Your Honor, I would like to now turn to  
17 the discount rate.

18 Q. Have you formed an opinion, Mr. Radecki, about the  
19 appropriate discount rate that should be used for purposes of  
20 determining the net present value of claims against Garlock?

21 A. I have.

22 Q. What is your opinion, sir?

23 A. That it should be a risk-free rate that correlates to the  
24 weighted average life of the distribution of claim.

25 Q. And what is that rate?



1 A. My calculation of that rate is 2.81 percent.

2 Q. Now you said it should be a risk-free rate. What do you  
3 mean by risk-free rate? I think it's obvious, but can you  
4 explain to the court?

5 A. A risk-free rate is a rate that does not consider a  
6 credit risk or what is commonly referred to as risk of  
7 default.

8 Q. Why should we be using a risk-free rate here, instead of  
9 other rates?

10 A. Well, frankly the default risk has no place in the  
11 calculation of the actual claims here. Default risk is a  
12 useful tool to analyze what the value -- or market value of a  
13 claim will be, not the actual amount of the claim itself.

14 Additionally, as a matter of really, equity, other claims  
15 inside of bankruptcy rate are not market, you know, values  
16 adjusted for risk of default inside the bankruptcy, and this  
17 makes an apples-to-apples comparison of those claims very  
18 easy.

19 Q. What was your source for your risk-free rate?

20 A. We used the yield curve of U.S. Treasury securities.

21 Q. Why did you use that?

22 A. We think it's the most robust measure of risk-free rates.  
23 U.S. Treasuries are usually considered the gold standard of  
24 risk-free securities, and that is -- the yield curve  
25 encompasses billions of dollars of sort of market analysis and

1 trading of those yields.

2 Q. Is it common in your field in investment banking to use  
3 U.S. Treasuries as a proxy for a risk-free rate?

4 A. Absolutely, routinely.

5 Q. So the ultimate discount rate that you got to was 2.81.  
6 What U.S. Treasuries did you use to derive that number?

7 A. We used the whole yield curve, and then used the weighted  
8 average life of the claims distribution we were provided by  
9 Dr. Rabinovitz, to isolate a point on that yield curve.

10 Q. And why is it important that you should correlate the  
11 discount rate to the weighted average life?

12 A. Well, the rate has to match the life of the claims. It's  
13 no different than a bond claim. If a bond claim is shorter --  
14 the yield curve, you know, generally is an upward sloping  
15 curve. Shorter -- shorter-term treasury securities, you  
16 generally have a lower rate, longer-term securities have a  
17 higher rate. Accordingly you have to find where on that yield  
18 curve corresponds to the data set you're given.

19 Q. Now, why did you use a weighted average instead of just  
20 picking the treasuries on a year-by-year basis?

21 A. You can do that. That's a methodology that works.  
22 However, the yield curve is a much more robust measurement.  
23 When you use individual treasury securities inside every year,  
24 you need to make a number of assumptions, including what  
25 security you're going to pick. That particular security can

1 have certain demand and supply characteristics that change the  
2 yield on that security, you know, individually in one  
3 direction or another.

4 Again, the treasury yield curve is billions of dollars of  
5 trades and a better overall set of data points than any  
6 individual security.

7 Q. Now, the concepts of inflation rate, and discount rate,  
8 and treasury yields are going to be familiar to everybody in  
9 the courtroom. But can you explain to the court what you're  
10 doing here in terms of the weighted average life as to the  
11 asbestos claims here? That's not a familiar concept, can you  
12 explain that?

13 A. Yeah. It's trying to figure out, generally, on a  
14 longer-spanned distribution as to where the average life of  
15 those claims are. And what you need to do is weight the  
16 claims by the percentage in each year they come. So you can  
17 formulaically follow -- you know, it's basically the sum of  
18 the percentage of claims in any given year, times the time  
19 elapsed from the start of your measurement period, divided by  
20 the overall years.

21 Q. And how did you determine that number in this case?

22 A. We took Dr. Rabinovitz's claim distribution and we fed it  
23 into the formula and calculated it.

24 Q. Can you explain this chart to the court, please?

25 A. Yeah. That is, by percentage, the claims distribution we

1 were presented by Dr. Rabinovitz. And the line there is our  
2 weighted average life of those claims.

3 Q. So that shows that a large percentage of claims are being  
4 filed or brought against Garlock in the early years, correct?

5 A. Yeah. Approximately 60 percent of the claims all end up  
6 before the weighted average life year.

7 Q. Now you're starting in 2010, even though all these claims  
8 have been stayed. Why are you doing that?

9 A. That's the distribution we were given by Dr. Rabinovitz.

10 Q. And you're not taking a position as to whether that's  
11 right or wrong, correct?

12 A. I am not, no.

13 Q. You're just the numbers guy?

14 A. I guess, yes.

15 Q. Now the forecast goes all the way out to 2050 and beyond?

16 A. Correct.

17 Q. And the weighted average life is what, eight years or so?

18 A. Just under eight years, yes.

19 Q. Can you explain how that -- how you derive that and  
20 why -- when you're looking at a projection that goes through  
21 2050, why it's appropriate to use an eight-year timeframe --  
22 7.8-year timeframe?

23 A. Obviously it's a very long tail that goes out beyond the  
24 2018 date. Obviously with very decreased percentages included  
25 in those out years.

1           As I said, roughly 60 percent of the claims fall prior to  
2   2018, and a very large percentage fall immediately thereafter.  
3   So there's much less weighting applied to those out years.

4   Q.   This isn't a novel concept what you're doing here, is it?

5   A.   No.  This is the way bonds and other financial  
6   instruments are handled all the time.

7   Q.   Now, we all know that there are five-year treasuries,  
8   10-year treasuries, 30-year treasuries.  So how did you derive  
9   the right point in the yield curve for the 7.83 years?

10   A.   It's very simple.  I mean, you just -- we basically did a  
11   intersection of the yield curve at the -- at our weighted  
12   average life which was 7.83, to intersect that and interpolate  
13   the rate between the seven-year and the 10-year treasury.

14   Q.   Now the information that you used to derive the weighted  
15   average life from the yield curve, that treasury information  
16   is as of when?

17   A.   It was the close of business of the last market trading  
18   day which turned out to be the Friday of the day before the  
19   debtors June 5th, 2010 filing date.

20   Q.   Why aren't you using the treasury data as of today, for  
21   example?

22   A.   Because we are attempting to value these claims as of  
23   petition date.  And so we wanted the data closest to the  
24   petition date.

25   Q.   Now Mr. Radecki, if you used a year-by-year approach

1 rather than the weighted average, would that create a very  
2 different result?

3 A. It would -- it might create a different result. I would  
4 not characterize it as a very different result. In fact, it  
5 would be relatively close, subject to those market anomalies  
6 and those individual securities.

7 Q. Now Mr. McGraw is the financial expert in this estimation  
8 hearing case for the ACC, correct?

9 A. Correct.

10 Q. Did you have an opportunity to read his report?

11 A. I did.

12 Q. Did he use a year by year approach?

13 A. He did.

14 Q. Is his discount rate different than yours?

15 A. It is.

16 Q. Do you remember what it is?

17 A. I believe it was roughly on a weighted basis,  
18 3.25 percent.

19 Q. So it's a little higher than yours, right?

20 A. Yes. But it was on a different data set.

21 Q. Can you explain that to Judge Hodges, please?

22 A. He was applying that rate to a data set where the  
23 weighted average life, Dr. Peterson's data set, the estimation  
24 expert for the ACC, in which his weighted average life was  
25 slightly over 10 years, I believe.

1 Q. So Dr. Peterson's data set goes out longer, so you need a  
2 slightly higher discount rate?

3 A. Yes.

4 Q. So you used the inflation rates that we saw on the  
5 earlier charts -- you bring those back. And we know we have a  
6 discount rate of --

7 A. 2.81.

8 Q. And what would you call -- I know that this is not  
9 something you use regularly in your work, but it's something  
10 that Dr. Bates uses in his rate. What's the difference  
11 between those two?

12 A. It's sometimes referred to as the real risk-free rate.

13 Q. What is the real risk-free rate once you subtract the  
14 inflation rate from the discount rate?

15 A. The real rate is simplistically defined as our treasury  
16 rate minus our inflation rate, if it's going to be the  
17 difference between those two numbers.

18 Q. What is the difference? What is the range?

19 A. It depends on year-to-year, obviously, with different  
20 inflation rates, it was different every year for us, at least  
21 up through 2015. But it spanned a range of .51 to, I think,  
22 1.8 percent.

23 Q. Now, for those of us who lived in 1970s when rates were  
24 in the double digits, this strikes us as a very low rate. Can  
25 you sort of put it in practical terms as to why that rate is

1 not at odds with reality?

2 A. Yeah. It's not at odds with reality at all. In fact, if  
3 we were to calculate -- do my calculation as of today, it  
4 would be -- real rate would be approximately 3 -- .37. So  
5 actually my rate would be -- that I have in my analysis, would  
6 be very, very conservative on that particular point.

7 Rates -- we are in a low interest rate environment. We  
8 are in a very low inflation rate environment. This  
9 environment has been going on for years. Frankly real rates  
10 over the decade prior to the debtors' filing were in the --  
11 roughly one percent range. They've been lower than that since  
12 the debtors' filing. And with current Fed policies, the  
13 expectation is they will continue to be lower than we've seen  
14 them, you know, 40 years ago, for example.

15 Q. That's why we earn nothing on our savings accounts?

16 A. That's exactly correct.

17 Q. Now I want to turn to Dr. Bates, who I think is here.

18 Dr. Bates prepared a report in this case, correct?

19 A. He did.

20 Q. Now I know you didn't read his whole report.

21 A. No, I did not.

22 Q. Touches on a lot of issues that you're not an expert in,  
23 we're not going to ask you to testify to.

24 Did you read the portion of his report that talks about  
25 the inflation and discount rates he uses in his forecast?



1 A. Yes, I did.

2 MR. GUY: Your Honor, the forecasts are very  
3 different between the experts in this case in terms of the  
4 total number, but we're just focusing on what inflation rate  
5 and discount rates they used.

6 Q. Did you agree with what Dr. Bates did as to much of his  
7 approach in inflation rates and discount rates?

8 A. Many things we conceptually agreed upon.

9 Q. Let's go through those. What inflation rate did  
10 Dr. Bates use in his report?

11 A. He also used a consumer price index.

12 Q. Do you remember the rate he used?

13 A. 2.5 percent.

14 Q. Where did he derive the CPI rate?

15 A. Derived it from a CBO forecast, but a very different one  
16 than I derived my rate from.

17 Q. So you both used a CPI rate, a general rate, correct?

18 A. Yes.

19 Q. And you both relied upon the CBO forecast, correct?

20 A. Correct.

21 Q. And the rate that he used actually was greater than  
22 yours, correct?

23 A. It is greater than mine, yes, it is. At least -- yeah,  
24 in all my years, including my out years.

25 Q. And that actually would make the future claims bigger,

1 right?

2 A. Higher inflation rate would make the claims larger, yes.

3 Q. So as to the inflation rate, you're really not -- you're  
4 not in dispute -- and to the extent we're in dispute, it's to  
5 the benefit of the debtors, correct?

6 A. That would be correct.

7 Q. Now I want to turn to the discount rate --

8 THE COURT: Benefit of the --

9 MR. GUY: Debtors, Your Honor, because --

10 THE COURT: His favors the debtors?

11 MR. GUY: The debtors' favors --

12 THE WITNESS: No.

13 MR. GUY: The debtors' favors us.

14 THE COURT: That's what I thought you said.

15 MR. GUY: I'm sure I messed that up, so let's get  
16 the record clear. I apologize, Your Honor.

17 Q. The rate that we used, the lower inflation rate is better  
18 for the debtors, because it results in lower inflation of  
19 future claims.

20 A. That's correct.

21 Q. And the adverse would be true?

22 A. That is also correct.

23 Q. All right. Now that we cleared that up. Thank you.

24 Did Dr. Bates use a risk-free rate?

25 A. He did.

1 Q. How did he derive his risk-free rate?

2 A. It was largely derived off treasury yield information  
3 from the CBO.

4 Q. So you're both agreeing that the treasury yields are a  
5 reliable source for risk-free calculations?

6 A. We are.

7 Q. So it looks like you're in agreement of pretty much  
8 everything except term, correct?

9 A. That's correct.

10 Q. Can you explain to the court why you disagree on that one  
11 last point, and what significance that has?

12 A. We disagreed -- while we generally got our information  
13 from the CBO, we do utilize very different forecasts that I  
14 think were published for very different reasons.

15 We were obviously focused on the near-term results, and  
16 the results that showed where the predominant portion of our  
17 claims distribution was.

18 Accordingly, we took a report from August of 2010, very  
19 close to the petition date that focused on those near-term  
20 rates. It was a 10-year projection published by the CBO.

21 Dr. Bates on the other hand took a report that was  
22 published by the CBO for the purpose of really projecting and  
23 analyzing the U.S. Government deficit, particularly with  
24 regards to entitlement programs.

25 And the claims distribution that was in that particular

1 report that the CBO was analyzing, was very different than the  
2 claims distribution in this particular process.

3 Q. Did he use a longer average term?

4 A. A much longer. The CBO report that he focused on was  
5 really a open end -- what I call an open-ended claims  
6 distribution, i.e. the claims continued, didn't closeout  
7 during the projection period, they continued on through, and  
8 it was a 75-year projection.

9 Q. Now, a 75-year projection would be correct if we were  
10 looking at a steady stream of payments over 75 years, correct?

11 A. It would be closer to reality, correct.

12 Q. Here it's not appropriate because the vast bulk of claims  
13 are going to be made in the near term, correct?

14 A. No, it would -- yeah, it's a mismatch for the types of  
15 claims that we have.

16 Q. Now, where you saw on the earlier chart, the distribution  
17 from Dr. Rabinovitz that she derived from looking at the  
18 debtor's data, Your Honor. Maybe Dr. Bates' use of the longer  
19 term was appropriate because his stream of payments was very  
20 different from Dr. Rabinovitz, did you test that?

21 A. We did.

22 Q. What did that show?

23 A. It showed that his claim distribution, notwithstanding  
24 the fact that the absolute numbers end up being very  
25 different, his claims distribution is nearly identical.

1 Q. How did you calculate Dr. Bates' claims distribution?

2 A. In the same way we calculated -- we saw the percentage of  
3 claims per year.

4 Q. From his report?

5 A. From his report.

6 Q. So even though he's saying the claims are a lot smaller  
7 in total amount, he's acknowledging that they're actually  
8 going to occur in pretty much the same ratio, correct?

9 A. That's correct.

10 Q. In fact, how close is that ratio?

11 A. Well, the ratio is so close, that his weighted average  
12 life came out to 7.84 years, or only .01 years different than  
13 Dr. Rabinovitz.

14 Q. So at least Dr. Rabinovitz and Dr. Bates agree on  
15 something?

16 A. Yes, it appears so.

17 Q. That .01 difference wouldn't justify the difference in  
18 the discount rates, correct?

19 A. No, not at all.

20 Q. So your discount rate was 2.81 and Dr. Bates was --

21 A. Five and a half percent.

22 Q. And that's the sort of discount rate that we would expect  
23 to see if you're going out a very long timeframe, right?

24 A. Possibly, yes. I mean, some historical information would  
25 tell you that that would be an appropriate discount rate if

1 you had open-ended claims distribution extending out beyond 75  
2 years.

3 Q. So to recap, in terms of the issues that are key for us  
4 on inflation rate and discount rate, you and Dr. Bates agree  
5 as to the CPI, the CBO forecast and you're in fundamental  
6 agreement on the inflation rate. To the extent there's a  
7 difference, it favors no prejudice to the debtors.

8 On the discount rate, you agree fundamentally on  
9 risk-free rates and the use of treasury yields to determine  
10 risk-free rates, but you just disagree on the term?

11 A. Yeah, very much so.

12 MR. GUY: Now, Your Honor, I want to turn now to  
13 Dr. Snow. Dr. Snow was the debtors' rebuttal expert as to our  
14 inflation rate and discount rate calculations. And because we  
15 lose Mr. Radecki, we're going to touch very briefly on that  
16 rebuttal report. This is Mr. Radecki's opportunity to respond  
17 to that rebuttal of his report.

18 Q. After submitting Dr. Bates' report where he outlines the  
19 risk-free rate, and the treasury yields and the inflation  
20 rate, the debtors submitted a rebuttal report from Dr. Snow,  
21 correct?

22 A. Yes.

23 Q. And Dr. Snow is a colleague of Dr. Bates?

24 A. Yes. They are both at Bates White.

25 Q. He criticizes your report, correct? And says that you

1 should have used different rates?

2 A. He suggests that maybe different rates would be  
3 appropriate.

4 Q. Okay. What are the different rates that he is suggesting  
5 to the court you should have used?

6 A. He doesn't pinpoint a single rate, but he talks about a  
7 return on pension assets rate, as well as a weighted average  
8 cost of capital.

9 Q. Did Dr. Bates use a return on pension rates?

10 A. He did not.

11 Q. That's Dr. Snow's colleague, right?

12 A. That's correct.

13 Q. Did Dr. Bates use the weighted average cost of capital?

14 A. No, he did not.

15 Q. That's Dr. Bates' colleague, right?

16 A. Snow, yes.

17 Q. Now, why wouldn't you use a return on pensions?

18 A. I think as I've testified, you know, we believe the  
19 appropriate rate here is a risk-free rate. A return on  
20 pension rate is not a risk-free rate, it's a risk rate. It  
21 includes the risk of the portfolio's securities inside that  
22 pension portfolio.

23 So it is not an appropriate measure for the calculation  
24 of claims. It may be an appropriate measure for the market  
25 valuation of recovery on such claims, but it's not for the

1 actual claim value itself.

2 Q. Now I know that Your Honor knows what WACC is. But for  
3 the record, can you explain to the court what is WACC?

4 A. Yeah. It stands for -- it's an acronym for weighted  
5 average cost of capital. It's essentially a aggregation of a  
6 company's cost of their capital through a calculation of their  
7 equity cost of capital and their debt cost of capital.

8 Q. I think Dr. Snow criticized you for not either using that  
9 or considering that, correct?

10 A. Correct.

11 Q. In what circumstances would it be appropriate in your  
12 mind as someone working in this field for 30-plus years to use  
13 WACC?

14 A. We use weighted average cost of capital all the time as  
15 we evaluate businesses and assets of businesses and streams of  
16 cash flows coming in off of assets.

17 Q. So something you use on a regular basis?

18 A. Daily.

19 Q. And it's a very respected process?

20 A. Absolutely.

21 Q. In both real world and academic circles?

22 A. Yes, absolutely.

23 Q. So why isn't it appropriate to use WACC here, given that  
24 it's so respected?

25 A. Again, it's a risk rate. It is meant to value,



1 essentially -- it's very good. It's part of the capital asset  
2 pricing model. It's a very good tool to use in terms of  
3 valuing assets. It's a tool you could use in the  
4 determination of recovery on liabilities, but it's not a good  
5 tool for determining the absolute claim value of a claim.

6 Q. Did you attend Dr. Snow's deposition?

7 A. I did.

8 Q. And he explained why he used WACC, correct?

9 A. Yes.

10 Q. Did his answer to a hypothetical that I posed to him  
11 explain in your mind why you shouldn't use WACC?

12 A. Absolutely.

13 MR. GUY: Your Honor, if I may, I just want to play  
14 a short excerpt from Dr. Snow's deposition.

15 (Video playing.)

16 (Video stopped.)

17 Q. Dr. Snow was very gracious in responding to my  
18 hypothetical and not fighting it.

19 Mr. Radecki, can you explain to the court the distinction  
20 there of why WACC just isn't appropriate?

21 A. Yeah. I think the video demonstrates in the hypothetical  
22 question, and Dr. Snow's, I think, very truthful answers,  
23 demonstrate the fallacy of the ability to use WACC to  
24 determine the asbestos claims. Because it's a totally  
25 illogical outcome for a profitable company which would

1 consequently have a lower WACC. Because it takes less return  
2 to get investors interested in investing in that company.  
3 Versus an unprofitable one where investors would demand a  
4 higher return, and therefore would have a higher WACC, that  
5 there would be a difference in the utilization of those  
6 respective WACCs toward valuing for that same set of asbestos  
7 liabilities.

8 As a consequence, the more profitable company because  
9 they have the lower WACC, would have -- that WACC was  
10 transplanted to be used as a discount rate, would have a  
11 higher amount of asbestos liabilities.

12 What I think that proves very simply is, the WACC is a  
13 mechanism for valuing -- a good mechanism for valuing what  
14 recovery can be on those claims, or chance of recovery on  
15 those claims. It's not a good mechanism for actually  
16 determining the amount of the claim.

17 Q. Let's just try to put that in a real world context that  
18 everybody in the courtroom understands. Let's put asbestos  
19 aside for a minute.

20 You have a company in distress and files for bankruptcy.  
21 You're familiar with that situation, correct?

22 A. Yes. I work in those companies all the time.

23 Q. Have you ever seen in your 30-years plus of experience, a  
24 situation where a bankruptcy judge has said, you bondholder,  
25 you have a \$10 million bond. That's the face value of the

1 bond. But the debtor can't pay that bond back, or can only  
2 pay a small percentage, and his WACC is off the charts because  
3 it's in bankruptcy distress. Therefore we're going to net  
4 present value that bond down to \$200,000. That's the amount  
5 of your claim bondholder. Have you ever seen anything like  
6 that?

7 A. No, I have not.

8 Q. So the amount of the claim can't be discounted by  
9 reference to WACC?

10 A. That's correct, it cannot, or should not.

11 Q. Are you aware of any court decisions, either in the  
12 asbestos arena or outside, addressing whether WACC is  
13 appropriate?

14 A. I am.

15 Q. Let's just focus on the asbestos agreement, because  
16 that's our interest here. What opinions are you aware of in  
17 the asbestos arena that have talked to whether WACC is  
18 appropriate or not, that you're aware of?

19 A. I'm aware of Judge Fitzgerald's recent opinion in what's  
20 commonly called the Bondex case.

21 Q. What was the gist of that opinion as to the discount  
22 rate?

23 A. The gist of her opinion was that a risk-free rate was the  
24 appropriate rate, and a WACC was not an appropriate rate by  
25 which to discount the claims back to net present value.

1 Q. Are you aware of any other court decisions?

2 A. I'm aware of a confirmation order, I believe, in Kaiser  
3 Aluminum Case. But I don't think it was necessarily disputed  
4 in that case. But that also -- Judge Armstrong also utilized  
5 in his confirmation proceedings, the risk-free rate.

6 MR. GUY: Your Honor, if the court has any  
7 questions, but otherwise pass the witness.

8 THE COURT: Okay.

9 MR. GUY: Under an hour, Your Honor.

10 THE COURT: All right.

11 Okay. Mr. Worf, you're going to do the honors?

12 MR. WORF: Yes, sir.

13 Richard Worf for the debtors.

14 CROSS EXAMINATION

15 BY MR. WORF:

16 Q. Good afternoon, Mr. Radecki.

17 A. Good afternoon.

18 Q. Let's talk about the risk-free rate first. That's what  
19 Dr. Bates used for his forecast rate?

20 A. Essentially, yes.

21 Q. You agree that in discounting, it is important to match  
22 the discount rate that's used with the inflation rate  
23 projections you're using, correct?

24 A. Absolutely.

25 Q. That's in part because the nominal interest rate that you

1 use for discounting is roughly equal to the real interest rate  
2 plus the expected inflation rate?

3 A. Repeat the question, please.

4 Q. That's because the nominal interest rate that you use for  
5 a discount rate, is roughly equal to the real interest rate  
6 plus the expected inflation rate?

7 A. That could be a way of looking at it, yes.

8 Q. This is what you had in your rebuttal report. You  
9 calculated the real rate implied by the discount rate and  
10 inflation rate that you chose. You see this is what's from  
11 your rebuttal report?

12 A. I believe that's part of the table from my rebuttal  
13 report, correct.

14 Q. You had your discount rate 2.81, and the inflation rate  
15 you got from the CBO report. And then you see a real rate of  
16 what's listed there?

17 A. Yeah, we did simply a subtraction in the case.

18 Q. For every year after 2013, it was a real rate under  
19 one percent?

20 A. That's correct.

21 Q. And in every year from 2015 and beyond it was .51?

22 A. That's correct.

23 Q. And Dr. Rabinovitz's forecast goes to 2054, correct?

24 A. I believe that's correct.

25 MR. WOLF: May I approach the witness, Your Honor?

1 THE COURT: Yes.

2 MR. WOLF: (Handing paper writing to the witness.)

3 Q. Mr. Radecki, this is the CBO report that you used for  
4 your inflation rates?

5 A. Yes.

6 Q. That is the August 2010 report entitled, "The Budget and  
7 Economic Outlook and Update"?

8 A. That's correct.

9 Q. Let's look at page 47 of this report. I'll read from the  
10 right-hand column.

11 A. The page numbers are so light -- there we go.

12 Q. I think they're on the top right --

13 A. There we go.

14 Q. -- of the page. Are you on page 47?

15 A. Yes.

16 Q. The right-hand column says, "CBO projects nominal  
17 interest rates by adding its projection for CPI U inflation,  
18 to its projection for real interest rates, which are  
19 determined by the rate of national saving and other factors.  
20 And CBO projections, the real rate on three-month treasury  
21 bills, averages 2.6 percent during the latter years of the  
22 projection period. And the real rate on 10-year treasury  
23 notes averages 3.6 percent. When combined with the projected  
24 rates of CPI U inflation, those real rates imply average  
25 nominal rates of 4.9 percent for three-month treasury bills,

1 and 5.9 percent for 10-year treasury notes. Do you see that?

2 A. Yeah.

3 Q. Let's turn to the table in the back. Let's go to page  
4 78. This is a table where you got your inflation rate,  
5 correct?

6 A. Either this table, I think there's portions of this table  
7 are portrayed in other parts of the document as well, but,  
8 yes.

9 Q. Let's look at the middle row. It says, consumer price  
10 index percentage change. I think that has your numbers in it  
11 starting with 1.6. Actually look at the footnote, it says in  
12 Part D, the consumer price index for all urban consumers. So  
13 that's actually the CPI U, right?

14 A. Yes.

15 Q. I think you stated it wasn't on your direct. But it is  
16 the CPI U.

17 And do you see that in the two rows lower down there are  
18 projections of the three-month treasury bill rate and the  
19 10-year treasury note rate.

20 Do you see that the projections for both those plateau  
21 pretty quickly. The years aren't visible on that screen, but  
22 they run from 2010 to 2020. It's a ten-year forecast, right?

23 A. That's correct.

24 Q. And by 20 -- let's see '10, '11, '12, '13, '14, by 2014  
25 it's got the nominal rates on the treasury instruments at 4.2

1 and 5.4, correct?

2 A. Correct.

3 Q. And that data is before the weighted average of  
4 Dr. Rabinovitz's forecast, correct?

5 A. Repeat the years again, just so I can --

6 Q. We're talking about 2014 right now.

7 A. That's correct.

8 Q. Then you see the next year it gets to what are  
9 essentially the long-term rates on those instruments. And  
10 it's got 5.0, for the three-month treasury bill rate, and 5.9  
11 for the 10-year note rate. Do you see that?

12 A. I see that.

13 Q. So it's correct, isn't it, that the CBO estimated that by  
14 the latter part of this 10-year forecast, the real rates would  
15 be between 2.6 and 3.6 percent?

16 A. It did.

17 Q. Now you criticized Dr. Bates for his reliance on another  
18 CBO report that has a 75-year term?

19 A. Correct.

20 Q. And Dr. Bates, the real discount rate that he used was  
21 approximately three percent, correct?

22 A. That is correct.

23 Q. And he derived that from a approximately 5.5 percent  
24 interest rate, and an approximately 2.5 percent inflation  
25 rate?



1 A. I believe he did, yes.

2 Q. Now his 3.0 percent is between the 2.6 and 3.6 percent  
3 CBO forecasts for the long-term real interest rate in this  
4 report, correct?

5 A. It is.

6 Q. And just to be clear, this is a 10-year forecast?

7 A. Yes.

8 Q. Now, instead of using these interest rates from the CBO  
9 report, you described where you got your interest rate on  
10 treasuries?

11 A. Yes.

12 Q. Now you're aware that the Cleveland Federal Reserve  
13 Branch publishes a report on the inflation expectations that  
14 are embedded in the market for treasury securities?

15 A. Yes, they do.

16 Q. Now one of the things that the Cleveland Fed looks at is  
17 the market inflation protected treasuries securities, also  
18 known as TIPS?

19 A. Correct.

20 Q. And that is a market-based method for determining what  
21 the inflation expectations are in any given market for  
22 treasury securities, right?

23 A. It is a measurement, yes.

24 Q. And you didn't use the Cleveland Fed Report to derive  
25 your inflation rates, did you?

1 A. No, I did not.

2 Q. I would like to read you a passage from Dr. Rabinovitz's  
3 deposition in this case.

4 Jonathan, it's page 95, lines 11/15.

5 Q. All right. Can you recall on your practice in  
6 this area, have you typically relied on the CBO to supply  
7 both the inflation rate and the discount rate in your  
8 bankruptcy cases?

9 A. I think so.

10 BY MR. WOLF:

11 Q. Were you aware of that testimony?

12 A. I was not aware.

13 Q. Were you aware that in the Owens Corning bankruptcy case,  
14 the discount rate expert that Dr. Rabinovitz relied on said  
15 the following:

16 "We use a Congressional Budget Office's long-term  
17 estimate of the percentage change in the Consumer Price Index  
18 for the inflation rate, and also their estimate of the  
19 interest rate on the U.S. 10-year Treasury note as our  
20 discount rate."

21 Which in 2000, the year OC and FB filed for bankruptcy  
22 were 2.5 percent and 5.7 percent, respectively?

23 A. No, I wasn't aware of that.

24 Q. Would 2.5 percent inflation rate and 5.7 percent discount  
25 rate, that would apply real discount rate of approximately

1 3.2 percent, correct?

2 A. Simple math, yes.

3 Q. Were you aware that the person who rendered that opinion  
4 was an employee of Dr. Rabinovitz's company at the time he  
5 rendered it?

6 A. No.

7 Q. Now let's talk about Dr. Snow and the rebuttal report  
8 that he rendered. Let me read you another passage from  
9 Dr. Rabinovitz's deposition?

10 Q. So you're measuring what you believe it, in our  
11 case, would it have cost Garlock to resolve claims  
12 principally through settlement, had it not filed for  
13 bankruptcy?

14 A. Through settlements and to the extent there  
15 were verdicts, through verdicts, as well, in the tort  
16 system.

17 Q. When you say "in the tort system", you're  
18 saying outside of the bankruptcy court, and if Garlock  
19 were in the same legal environment it was before it filed  
20 for bankruptcy?

21 A. Correct.

22 MR. WOLF: Jonathan, that's pages 51 to 52.

23 Q. Now, do you understand that Dr. Snow's criticism of the  
24 use of the risk-free rate to discount Dr. Rabinovitz's  
25 forecast, in particular, was based on his understanding that

1 she was projecting what the stream of payments and value of  
2 those payments would have been outside of bankruptcy?

3 A. I believe he said that in his report.

4 Q. And you agree that if you were discounting these claims  
5 outside of bankruptcy, you would not apply the risk-free rate,  
6 correct?

7 A. That's not correct, no.

8 Q. Sir, do you remember when I took your deposition in New  
9 York --

10 A. I do.

11 Q. -- a month and a half ago?

12 A. I do.

13 Q. "Mr. Radecki, we were discussing discounting future  
14 asbestos expenditures --"

15 A. Excuse me. I can't see it on the monitor. Okay.

16 Q. I'm sorry. "Mr. Radecki, we were discussing discounting  
17 future asbestos expenditures outside of bankruptcy. And just  
18 to be clear I wanted to ask you again. If you were doing that  
19 outside of bankruptcy, would you apply a risk-free rate of  
20 return?

21 A. No, I probably would not."

22 BY MR. WOLF:

23 Q. That was your testimony, correct?

24 A. That was my testimony, correct.

25 Q. Do you recall at another point Dr. Snow made, and one

1 reason why he said the WACC would be an appropriate discount  
2 rate for discounting Dr. Rabinovitz's forecast was  
3 uncertainty, correct?

4 A. Correct.

5 Q. You agree uncertainty should be taken into account, but  
6 by the person making the forecast, correct?

7 A. I'm not going to opine on what Dr. Rabinovitz does.

8 Q. But you assume Dr. Rabinovitz would take uncertainty into  
9 account?

10 A. I assume she would take any number of variables into  
11 account. I'm not exactly sure what all those are.

12 Q. Well, in any event, your discounting does not take into  
13 account any uncertainty in Dr. Rabinovitz's forecast, does it?

14 A. It does not, no.

15 Q. Now, do you agree that if Dr. Rabinovitz is incorrect on  
16 the timing of claims in her forecast, and in fact the claims  
17 would arise further into the future than she projected, your  
18 discount rate would be too low, correct?

19 A. Correct.

20 Q. Let's talk briefly about the pension rate issue. This is  
21 another issue Dr. Snow raised.

22 Were you aware that one of the findings the court seeks  
23 to make in this proceeding is, "a reliable and reasonable  
24 estimate of the aggregate amount of money that Garlock will  
25 require to satisfy present and future mesothelioma claims"?

1 A. I believe that's one of the things they will be looking  
2 at -- the court will be looking at, at one point, yes.

3 Q. Now you did not calculate the rate of return that a  
4 hypothetical trust might make on its assets, correct?

5 A. I did not, no.

6 Q. And you have no basis for opining on whether asbestos  
7 trusts invest in risk-free assets, correct?

8 A. No. No basis.

9 Q. You're aware that Dr. Snow in his report did calculate a  
10 rate of return on trust assets that exceeds the risk-free  
11 rate?

12 A. Yes.

13 MR. WORF: Thank you, Mr. Radecki. No further  
14 questions.

15 MR. GUY: Redirect, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. GUY:

18 Q. On cross from my learned colleague, Mr. Worf, he asked  
19 you about the Owens Corning case, and a calculation that  
20 Dr. Rabinovitz your colleague did. You weren't involved in  
21 that case with Dr. Rabinovitz, were you?

22 A. No, I was not.

23 Q. But he said, I believe, it was in the year 2000; is that  
24 right?

25 MR. WORF: The bankruptcy was in 2000, the report

1 was in 2004.

2 MR. GUY: Okay.

3 Q. Interest rates, inflation rates, discount rates were very  
4 different 13 years ago, weren't they?

5 A. They were very different. In fact, we have opined using  
6 the same methodologies, but with much higher rates. I know  
7 during WR Grace cases which also occurred in generally the  
8 same timeframe, 2001.

9 Q. And you're just relying on the rates as they are set  
10 forth in the CBO reports, correct?

11 A. Exactly, inflation rate, correct.

12 Q. Correct. And you're looking at the Treasury yields as  
13 set forth in the market by the market, which is what, a  
14 multi-trillion-dollar market?

15 A. That's correct. We don't utilize the 10-year treasury  
16 rate that comes from the CBO report because we don't need it.  
17 We have a real-time market evaluation of what interest  
18 rates -- risk-free interest rates will be over time.

19 The Treasury yield curve spans anywhere from one month to  
20 30 years. And so we have real-time information on that.

21 It's very difficult, and the reason we use the CBO report  
22 for inflation is, there is not real robust inflation  
23 information into the future.

24 People have tried, market professionals have tried to use  
25 the TIPS markets as Mr. Worf cited. But it's been a very

1 unreliable indicator. It hasn't proved to work out very well  
2 because of the market anomalies associated with that  
3 particular set of securities, including particular lack of  
4 liquidity in that general market.

5 Q. And Dr. Bates who is here, expert, very impressive  
6 credentials. He used Treasury yields, didn't he?

7 A. Essentially, yes.

8 Q. Now, my colleague Mr. Worf showed you the CBO projections  
9 from the budget and economic outlook. And one of the things I  
10 think he pointed to was three-month Treasury bill rate in 2013  
11 being 3.1 percent. That was CBO's forecast, right?

12 A. Yes.

13 Q. Do you have any idea what three-month Treasury bill rates  
14 are today?

15 A. It's well less than one percent. In fact, the two-year I  
16 believe is only -- pardon me, the 10-year Treasury is only at  
17 2.6 percent right now.

18 Q. Do you know what the three-month Treasury bill rate is?

19 A. Again --

20 Q. Less than one percent?

21 A. Less than half percent.

22 Q. Yeah. That's what we all get on our savings account,  
23 isn't it?

24 A. If that.

25 Q. Now, having dispensed with the CBO Treasury yields



1 dispute. Let's now talk about the claims out of bankruptcy  
2 issue.

3 Now, I know that you are not a bankruptcy law expert. We  
4 have a bankruptcy law expert, as Mr. Inselbuch sagely advises,  
5 that's Judge Hodges.

6 But in bankruptcy, is it your understanding --

7 THE COURT: Scary thought.

8 MR. GUY: More of an expert than me, Your Honor.

9 Q. Is it your understanding that claims -- when you  
10 determine the amount of the claim, you look to what the claim  
11 would be, forget asbestos for a minute. Let's just focus on  
12 something that is hopefully noncontroversial. A bond claim,  
13 we can all understand that?

14 A. Right.

15 Q. The bond claim is going to be determined as to what the  
16 bondholder is entitled to under the law, outside of bankruptcy  
17 and inverted commerce under state law, correct?

18 A. I believe so, yes.

19 Q. And the recovery that that bondholder is entitled to in  
20 the bankruptcy, is going to be determined by the amount of  
21 assets -- which we're not getting to in the estimation  
22 hearing, that's coming later -- the amount of assets available  
23 to pay that claim, right?

24 A. That's correct.

25 Q. And that may be less than 100 cents on the dollar?

1 A. Oftentimes is.

2 Q. Sadly so. Now, that doesn't mean though, that when you  
3 determine the amount of the claim, that you're then going to  
4 get a percentage recovery on, that you would reduce the face  
5 amount of the claim under some net present value calculation  
6 that looks at the cost of borrowing, the cost of debt, cost of  
7 equity of the debtor, correct?

8 A. That's correct.

9 Q. Because to do that would just be plain silly, because  
10 debtors have really high costs of borrowing, don't they?

11 A. That's correct. It would be an iterative reduction to  
12 the point where the claim would be zero.

13 Q. You have never seen that, have you?

14 A. No, I have not.

15 MR. GUY: Thank you, Your Honor.

16 THE COURT: All right. He can step down. Thank  
17 you, Mr. Radecki.

18 Okay. Mr. Cassada, back with you.

19 MR. CASSADA: Thank you, Your Honor. We have  
20 Mr. Magee ready to take the stand.

21 It might be helpful, Your Honor, if we could have an  
22 idea of how long you would be interested in going.

23 THE COURT: I would say 5:30.

24 MR. CASSADA: 5:30?

25 THE COURT: Yes. With the budget constraints, we've

1 got to be out of here by 6:00 or the doors get locked and we  
2 don't get out.

3 MR. GUY: Your Honor, before we swear the witness on  
4 our part, we know Mr. Magee is not going to get on and off.  
5 We're fine for him not to be sequestered because he's under  
6 oath. I don't think it would be fair to the company or to Mr.  
7 Magee.

8 THE COURT: All right.

9 RICHARD MAGEE,

10 Being first duly sworn, was examined and testified as follows:

11 DIRECT EXAMINATION

12 BY MR. CASSADA:

13 Q. Would you please state your name for the record?

14 A. My name is Richard Magee. It's there on the slide.

15 Q. Can you describe in summary fashion for the court your  
16 education and employment up through today, ending with your  
17 current position?

18 A. I sure can. I went to the University of North Carolina  
19 Chapel Hill and received my undergraduate degree there in 1980  
20 in economics and political science. Continued on to UNC  
21 School of Law where I got my law degree in 1983. After  
22 passing the Bar that summer, I began work with the law firm  
23 then known as Fleming, Robinson and Bradshaw. Now known as  
24 Robinson, Bradshaw and Hinson. Worked there for a little over  
25 six years. While I was there I did a variety of things. In

1 fact, I cut my teeth early in my career down in Judge Wooten's  
2 courtroom. So that quickly made me determined to be a  
3 corporate lawyer.

4 I left Robinson Bradshaw after six years and went to  
5 United Dominion Industries, it was then AMCA International. I  
6 went there as assistant general counsel in charge of M&A work,  
7 M&A legal work and securities work, was there for 12 years.

8 In the latter part of the 1990s I became general counsel  
9 there, senior vice president general counsel. That company  
10 was sold to a -- that was a diversified industrial company  
11 here in Charlotte. It was sold to SPX Corporation in 2001.  
12 SPX already had a general counsel so I was unemployed for  
13 three months.

14 Fortunately at that time Goodrich had decided to spinoff  
15 all of its non-aerospace businesses, and that resulted in the  
16 creation of a new public company, which is EnPro Industries.

17 And after a consulting period with Goodrich while we were  
18 trying to put the company together and get the spinoff done, I  
19 became Senior Vice President General Counsel for EnPro  
20 Industries. I've been in that capacity since 2002, with the  
21 exception of about a year and a half ago I relinquished the  
22 general counsel title, mainly to focus principally on this  
23 bankruptcy case.

24 Q. Can you explain to the court your relationship as an  
25 EnPro employee to the debtors in this case?

1 A. Sure. Our legal department in Charlotte provided legal  
2 services for the corporation and all of its subsidiaries,  
3 including these debtors. So I was legal counsel to these  
4 debtors.

5 Q. Who were your key reporting relationships with the  
6 debtors?

7 A. My key reporting relationship was sort of a dotted line  
8 relationship I had with the president of Garrison, Mr. Paul  
9 Grant. Mr. Grant ran the Garrison office. Garrison existed  
10 to manage the asbestos litigation for Garlock. So that was my  
11 key reporting relationship.

12 But I had an informal relationship with him as well, and  
13 we talked regularly. Obviously Garlock's asbestos litigation  
14 was very important, not only to Garlock, but to the company,  
15 and so we talked regularly about those claims and what they  
16 were doing at Garrison.

17 Q. Did you have a specific role in the resolution of  
18 asbestos claims against the debtor, against Garlock?

19 A. I did, both a formal role and an informal role. I had  
20 approval authority by Mr. Grant, and his team had authority  
21 for claims up to certain approval levels. And in excess of  
22 their approval levels, my approval was required. There were  
23 also levels where our CEO's approval was required. So I had a  
24 formal approval authority and a level where my approval was  
25 required with respect to settlements over a certain dollar

1 threshold.

2 But more than that, Mr. Grant and I talked, as I said,  
3 regularly about the resolution of all the claims, to the  
4 extent they were at all significant or material.

5 Q. As it relates to Garlock's asbestos litigation, what was  
6 your role with respect to EnPro and Garlock offices and  
7 directives?

8 A. Well they relied on me as the person in the company to  
9 provide reports on what was going on, to understand what was  
10 going on, and to explain what was going on. And that was fine  
11 with me. I viewed myself as the senior legal officer for  
12 company. I viewed myself as being ultimately responsible for  
13 those, and for how they were managed. That's how officers and  
14 directors of both those companies viewed my role.

15 Q. Were you also involved in financial and insurance matters  
16 related to the asbestos litigation?

17 A. Sure. I spent a lot of time on those matters, as well,  
18 particularly in the early years. Keeping up with -- obviously  
19 there were financial matters involved. And there was a  
20 significant disclosure item in our SEC reports. I was  
21 responsible for those SEC reports. So I spent considerable  
22 time with that.

23 With the insurance, while most of the insurance had been  
24 put in place in the mid-'90s, there were still some  
25 outstanding insurance issues. And we had some issues with

1 insurers that had to be resolved. So I was involved with  
2 Mr. Grant on those kind of matters well into the mid-2005s --  
3 I'm sorry, mid 2000s.

4 Q. Focusing back on Mr. Garrison. You said something about  
5 in-house counsel. Can you tell me what the role of the  
6 Garrison in-house counsel was or were?

7 A. I can. Mr. Grant was a lawyer, and he was president of  
8 Garrison. And he headed up -- obviously headed up that  
9 office. And he had different numbers of lawyers at different  
10 times, but principally during my tenure, three lawyers  
11 reporting to him. So there were four in-house lawyers at  
12 Garrison, whose responsibilities were to manage the  
13 litigation, all aspects of the litigation. Making sure that  
14 all the cases were covered. Making sure lawyers were in  
15 place. Making sure settlement agreements were done, releases  
16 were obtained. All the really soup to nuts responsibility for  
17 the claims.

18 Q. Did you also deal with outside counsel?

19 A. I did. And Garrison did. There was -- there was a  
20 network of outside counsel who worked on the cases, obviously,  
21 there were thousands. When I arrived there were tens of  
22 thousands of cases being resolved every year. So there were  
23 counsel in every jurisdiction. And Garrison had appointed  
24 regional counsel to coordinate each region. There was a  
25 regional counsel for the east, for the south, for the region

1 included the midwest and Texas and then for the west. So  
2 there was a regional coordinating counsel that worked with the  
3 Garrison lawyers for each of those jurisdictions, those  
4 regions. There were also trial counsel across the country,  
5 and local counsel across the country. And Garrison worked  
6 with the regional counsel to coordinate their assignments and  
7 their work.

8 Q. Approximately how much of your time did you spend on  
9 Garlock's asbestos-related claims?

10 A. Well, it varied from time to time. But on average over  
11 the time of anywhere from 40 to 50 percent. At least up until  
12 the filing of the bankruptcy petition. Since then it's been  
13 at least 90 percent or more.

14 Q. Focusing on the time when you actually arrived on the  
15 scene. What was your initial assessment of asbestos  
16 litigation against Garlock?

17 A. Well like most everybody who first learns about this  
18 litigation, and particularly litigation against a peripheral  
19 defendant like Garlock was then, is that you're pretty amazed  
20 and shocked at how many claims there are and how much money  
21 it's costing.

22 I quickly learned about the products, and learned what  
23 the products were, and figured out that it's a gasket. It's a  
24 gasket and it's packing. And it just was amazing and shocking  
25 to me that that much money was being spent.



1           So my initial reaction, like a lot of people's is, we  
2 ought to be trying more cases. We ought to be -- we shouldn't  
3 be paying what Garlock is paying to resolve the claims.

4           But it didn't take me long as I got into it to figure out  
5 why the strategy had been adopted that had been adopted.

6 Q.    Okay. There's a slide we have here to demonstrate your  
7 assessment when you got there. Can you explain to the court  
8 what this slide depicts?

9 A.    I can. This really explains what I was just saying  
10 pretty well graphically. The blue bars there are the number  
11 of claims that were resolved each year. If you look, I came  
12 on as I said to -- as a consultant to Goodrich in 2001. And  
13 what I found when I looked at what was going on, is that  
14 Garlock was resolving tens of thousands of claims -- mostly  
15 nonmalignant claims. But tens of thousands of claims every  
16 year and had been for over a decade. On average it was paying  
17 \$1,000 to \$2,500 per claim.

18           Again, most of those claims were nonmalignant claims. I  
19 know the court has heard a lot about those nonmalignant  
20 claims. We're not here to talk about nonmalignant claims, and  
21 I'm not. But it's important because that sort of shaped my  
22 impression of what was going on. Tens of thousands of claims  
23 that had to be resolved every year.

24           Even in that environment though, Garlock was paying  
25 approximately \$5,000 a claim on mesothelioma claims over that

1 time period. That number had started to go up some, but if  
2 you look at the red bar you'll see the slight rise in the  
3 averages for the mesothelioma claims hardly made a dent in the  
4 overall average settlement. Still Garlock's overall  
5 settlement was \$1,000 to \$2,500 per claim.

6 So obviously it was about low -- paying as low cost  
7 settlements to resolve the claims as you could. We couldn't  
8 even pay a lawyer to go to a deposition for \$1,000 or \$2,500.

9 Q. Did you assess what was going on with nonmalignant  
10 claims? Approximately how many was Garlock receiving in a  
11 year at that time?

12 A. Well, this shows how many were being resolved. There  
13 were more than that in that time period being received.

14 In all those time periods, starting in really the  
15 mid-1990s, there were tens of thousands of nonmalignant claims  
16 being received every year.

17 Q. Each year. You mentioned that you didn't have any choice  
18 but to resolve them for small payments. Why would you pay  
19 them anything at all?

20 A. Well, because you either had to pay them or default or go  
21 to trial on them. I mean, you've been sued. Garlock was sued  
22 with 50, 75, 100 -- more than 100 other companies, but it was  
23 named in a lawsuit.

24 I think most folks in this courtroom know what happens  
25 when you're named in a lawsuit. You have to answer the

1 Complaint. You have to hire a lawyer to do that.

2 So Garlock had to hire a lawyer to represent it in the  
3 lawsuits. And so obviously started spending money on each of  
4 the lawsuits when they came in.

5 So that's why it was important for Garlock to have a  
6 resolution strategy that allowed it to save as much of those  
7 costs as it could.

8 I think Dr. Bates had a slide in his report, and you used  
9 it in your opening, it may be the next slide here. That would  
10 help me explain that.

11 We talked about Judge Posner's model of what a defendant  
12 is willing to pay to settle the case. The left side of the  
13 equation has to do with defendant's expected liability.

14 I think in the setting where we were, I think everyone  
15 would acknowledge that side of the equation was always zero.  
16 Nobody thought that a gasket manufacturer would have any  
17 responsibility for the claims if they went to verdict in that  
18 environment. And obviously that was evident from the  
19 settlement amounts. They were settling for 1,000, 1,500,  
20 \$2,500 per claim.

21 So it was really the other side of the equation that was  
22 driving what we were doing, which was defendant's avoidable  
23 costs. Even in those days to try a case to verdict, it would  
24 have cost 50,000 to \$100,000.

25 So by paying \$1,500 to \$2,500 to resolve a claim, Garlock

1 was able to avoid to 48-, \$49,000 it would otherwise cost it  
2 to try a case, even if it won every case.

3 So that's what drove Garlock's settlements was avoiding  
4 cost.

5 Q. As a nonscience person, how did you analyze Garlock's  
6 liability for its product?

7 A. Well, I guess I learned about the science, as the court  
8 has some this week. And -- but even before that -- even long  
9 before I knew the difference between what a chrysotile fiber  
10 and what an amphibole fiber was, I realized this product was a  
11 gasket.

12 It was a gasket that spent its useful life inside a  
13 flange. It was baked into a binder. It wasn't -- it was  
14 nonfriable. It spent its useful life between flanges in a  
15 piping system. It just happened to be that it was in the same  
16 environment with some very dangerous products.

17 So from my understanding from the beginning was that this  
18 was something that Garlock didn't have responsibility for, but  
19 it was caught up in this mess and had to pay its way through  
20 it.

21 Q. So you determined then why Garlock was named in so many  
22 cases?

23 A. Well, my view of that and what I was understanding from  
24 folks, there were a variety of reasons. And, you know,  
25 obviously one of those reasons was, it had been owned by

1 public companies for quite some time, and it had disclosed the  
2 amount of its insurance that it had to cover product liability  
3 claims, and that was one thing that obviously had drawn  
4 claims.

5 Another thing, there was testimony about that earlier,  
6 Garlock had a strong brand name. It was -- it was well known  
7 as a -- as a manufacturer of sealing products, including  
8 gaskets.

9 And folks who would have known about those things, knew  
10 that the only product approved for certain applications was an  
11 asbestos gasket.

12 Plaintiffs' lawyers would have known that Garlock was a  
13 name, that Garlock's products was used, had asbestos, and was  
14 used around, you know, dangerous insulation products. And  
15 that brings me, probably to what I believe was the principal  
16 reason why Garlock was sued, that's that its product was there  
17 in the environment where the dangerous asbestos insulation  
18 was.

19 I mean, in the -- we can talk about it later, but in the  
20 words of one plaintiff's lawyer Dickie Scruggs, asbestos  
21 litigation was always the search for the next solvent  
22 bystander. Bystander meaning their products were there with  
23 the dangerous products. And Garlock had an asbestos product  
24 there in the environment with the dangerous products.

25 Q. So back to Judge Posner's formula. What was your focus

1 on this formula?

2 A. Well, at all times -- at all times, because of the number  
3 of claims, our focus had been on avoidable costs. That's  
4 what's driven our settlement strategy throughout, is avoiding  
5 costs to resolve these claims.

6 At that point in time there wasn't -- you know, we didn't  
7 think Garlock had any liability. The plaintiffs' lawyers  
8 didn't think Garlock had any liability. Nobody wanted to try  
9 a gasket case. The cases resolved for those small dollars.

10 There certainly became a period of time where, through a  
11 variety of measures, the plaintiffs' lawyers tried to create a  
12 perception of liability for Garlock and were successful at  
13 that. So the formula changed in that respect at some point.  
14 But in that time period it was all about avoidable cost.

15 Q. Now looking back to 1990s, before you got there, did you  
16 kind of have an understanding about whether Garlock would be  
17 named in cases with lots of other defendants?

18 A. Oh, yes. If you looked at those Complaints, the captions  
19 of the Complaints went on for pages and pages. There were  
20 dozens -- hundred or more defendants in the lawsuits.

21 And today, and you can look at captions, there's still  
22 several defendants named. Some of the early defendants are  
23 obviously absent because of their bankruptcies, but there's  
24 still several defendants named. But the captions then went on  
25 for pages and pages.

1 Q. So you talk about defendant's avoidable cost. How do  
2 avoidable costs differ from incurred costs?

3 A. Well, the avoidable cost is what it is before it's  
4 incurred. So at the time that you get the lawsuit, all your  
5 costs are avoidable. If you settle it right away, you've  
6 avoided them all. When you start incurring cost, it reduces  
7 the amount of avoidable costs you have, obviously you can't  
8 put the toothpaste back in the tube, you spent the money, it's  
9 no longer avoidable.

10 So the later, you know, the more money you spend, the  
11 less avoidable cost. But you still have avoidable cost until  
12 you get to the conclusion of the case.

13 Q. Now was Garlock ever involved in trials back in this time  
14 period?

15 A. It was.

16 Q. What can you tell us about that?

17 A. Well, I think this has been talked about a lot. Garlock  
18 won 92 percent of the cases that went to verdict in that  
19 timeframe, and I sort of had to bite my lip a little bit  
20 during opening arguments when talked about that as if that  
21 were representative of Garlock's cases.

22 The cases that went to trial were the cases specially  
23 selected by plaintiff's lawyers because they thought they  
24 could get more money in the settlements. So they demanded  
25 higher settlements and selected cases where they thought they

1 had the best cases against Garlock.

2 And I heard folks talking about how Garlock selected the  
3 cases that it would try. And that's true, I guess, Your  
4 Honor, in sort of a final way, in that Garlock's choice was to  
5 pay the higher settlement demanded or go to trial.

6 Obviously if the settlement demand was very high, Garlock  
7 would go to trial to defend itself, and it did very well when  
8 it did go to trial.

9 This is the record -- this next slide here shows the  
10 record in that time period, 1990 to 2000. It went to trial  
11 on -- all the way to verdict. It went to -- it started trial  
12 in a lot more than 36 cases. It went to verdict in 36 cases,  
13 won 33 of them, and lost three of them.

14 And I know in their opening, Mr. Swett and committee  
15 tried to make numbers like this seem small, but recall that at  
16 that time Garlock was resolving claims for less than \$5,000.

17 So what this represented -- in fact, and we'll see a  
18 slide about it later. In Garlock's entire time period, entire  
19 time period of resolving these claims, it only paid more than  
20 \$250,000 on one out of every hundred cases.

21 So when it could resolve those cases for low values, it  
22 was not going to trial. It was only when the settlement  
23 demands were high that Garlock would go to trial to defend  
24 itself.

25 Q. Now, maybe I'm asking --



1 A. We'll talk about it later, Mr. Cassada -- sorry to  
2 interrupt, but this slide also shows what happened to its  
3 winning record during and after the bankruptcy wave. It still  
4 won most of its cases, but its winning percentage went down.

5 Q. Maybe I'll be asking the same question from a different  
6 angle, but with this kind of success why not just try all the  
7 cases?

8 A. Well, that would -- that would be a quick decision to  
9 spend a lot of money very, very quickly.

10 Even during this timeframe, I think I may have even said  
11 that earlier, the cost to try these cases to verdict was  
12 anywhere from 50,000 to \$100,000. And that was because you  
13 had the dangerous product defendants in the courtroom  
14 defending their cases. And it was pretty easy for Garlock to  
15 point to those defendants as the culpable parties. In fact,  
16 the claimants were acknowledging they were the culpable  
17 parties.

18 But it still cost considerable money to try the case.  
19 It's a lot cheaper to spend \$1,500 on a case than to spend  
20 \$100,000 or even \$50,000 to win the case.

21 Q. Let me ask you about a specific jurisdiction where  
22 Garlock tried cases, New York County, in particular, the  
23 Extremis Docket. Can you describe what Garlock's experience  
24 was in the New York County Extremis Document?

25 A. Yeah. That was a difficult place for Garlock, and I'll

1 explain why.

2 And you heard Mr. O'Reilly talk about -- in a little clip  
3 from his deposition that Mr. Swett heard, and I'll talk about  
4 that a little bit.

5 But it was difficult because it was a very expensive  
6 jurisdiction for Garlock. And the reason it was an expensive  
7 jurisdiction is, there were two extremis dockets each year in  
8 New York County. And what that meant was that claimants who  
9 had serious diseases got ahead of all the other cases -- if  
10 they were still alive and had serious diseases, then they were  
11 on one of those extremis dockets which meant that they were  
12 first for their cases to be tried, and that happened twice a  
13 year.

14 And the Weitz and Luxenberg firm, who was our principal  
15 opponent in the New York County, we liked to say, controlled  
16 that docket. But the reason they controlled that docket is  
17 they had so many claims on that docket.

18 So each of those extremis dockets, they would have  
19 dozens, 50, upwards of 50 claims on the docket. They got to  
20 decide what order they would try those cases in. And they got  
21 to advise the defendants of that order fairly shortly before  
22 the trial list began.

23 So if Garlock was going to defend itself in New York  
24 County, it had to prepare each one of the Weitz's cases on the  
25 extremis docket, not knowing which ones were going to be

1     tried. And Weitz got to know what it was going to try, and  
2     then got to give the orders of trial shortly before.

3             So obviously that significantly increased the cost to  
4     Garlock of preparing cases for trial. It had to prepare the  
5     whole docket. Its choice was, prepare to go to trial on all  
6     the cases in the extremis docket for that period, or settle  
7     all the cases in the extremis docket.

8             And Mr. O'Reilly was talking about a time that Garlock  
9     chose to go to trial, and that was a consolidated case against  
10    Garlock that had, I believe, 32 cases up for trial. And it  
11    was -- Your Honor, what was called reverse bifurcation, which  
12    used to be the way these cases were tried in New York County.

13            The only other place I know that it was ever tried was in  
14    Philadelphia. It's designed to provoke settlements because  
15    there's so many claims, and thousands and thousands of claims.

16            So what you do is, in the first phase you try damages,  
17    without respect to liability. You try damages and the jury  
18    determines how much all the defendants who are still present  
19    in the courtroom -- without regard to the defendants, nothing  
20    about their liability -- what the damages that the claimants  
21    suffered -- whatever their total damages.

22            What Mr. O'Reilly was referring to, was in those 32 cases  
23    in that consolidation, the jury determined that the damages  
24    for those 32 claimants totaled \$75 million. It said nothing  
25    about the liability of the particular parties.

1           The next thing that happens is, you go to phase two where  
2 that same jury, same jury that's now invested in a damage  
3 amount, decides whether the defendants at trial are liable or  
4 not.

5           So most defendants settle pretty quickly if they haven't  
6 already after the phase one verdict -- after phase one damage  
7 award, because they know that jury's invested in that award,  
8 and it's very likely to find defendants responsible if they're  
9 around at time for trial.

10          So it was in that environment that those cases were  
11 resolved. There was seven of the 32 that Garlock was named  
12 in. As a result of that, the Weitz firm was able to get  
13 Garlock to settle -- Garlock and Anchor, they were both in it,  
14 they settled 4,000 cases as a result of that, not just those  
15 seven, but 4,000, at an average settlement amount of \$6,000.

16          So yeah, that was significantly more than what it had  
17 been paying, the less than \$5,000. But even in light of that  
18 phase one award, Garlock was -- Garlock and Anchor were able  
19 to settle 4,000 cases in an average payment of \$6,000.

20          Now the seven cases in that group got considerably higher  
21 allocations, 100,000 to \$250,000 from that. But the overall  
22 average in that 4,000 claim settlement was \$6,000.

23 Q.   So it sounds like you did try some cases. How would you  
24 come then to be in a trial?

25 A.   Well, as I said, obviously Garlock was trying to settle

1 the cases where it could for low-cost avoidance payments.

2 But there was also a give and take. And the plaintiffs'  
3 firms were always trying to move that bar and raise the  
4 settlement amount. So if the plaintiff's law firm was trying  
5 to get a higher settlement on a case than it had traditionally  
6 gotten, Garlock's choice had to be, do I pay the higher demand  
7 they're making or do I go to trial.

8 So that's what -- it was the claimants deciding to push  
9 for higher settlements -- plaintiffs lawyers' -- higher  
10 settlements on select cases, that became the cases that  
11 Garlock had to determine which would we try and which would we  
12 pay the higher settlement demand.

13 Again, they were still far below the cost of trial. But  
14 you couldn't let the settlements continue to inch up, because  
15 they would affect all your other settlements.

16 The fact that you might pay \$6,000 on a claim rather than  
17 5,000, sounds like it's something you would do if the cost was  
18 \$50,000.

19 But if that's going to then get leveraged across  
20 thousands of claims, you got to think hard about whether  
21 you're going to do that or not. So that sort of drove those  
22 decisions.

23 Q. So overall what was your reaction to all the asbestos  
24 claims against Garlock?

25 A. Well, it was -- it was similar to the Supreme Court's

1 reaction in their decision when they said it was elephantine  
2 mass of claims that defied our judicial system and cried out  
3 for a legislative solution so we participated in attempts to  
4 try to bring about legislative solution.

5 Q. So you had come in and assessed or analyzed the  
6 situation. On what strategy did you settle on to manage the  
7 litigation in the future?

8 A. Well, you remember those two years right before I got  
9 there. You saw the huge number of claims resolved, 40-,  
10 50,000 claims or more in those years.

11 Under Goodrich's direction, the Garrison team had  
12 embarked on a strategy where it tried to resolve as many of  
13 those claims as it could, as cheaply as it could. That was  
14 called an inventory settlement. A lot of defendants were  
15 doing those kind of settlements, to try to pay as low amounts  
16 as they could, resolve as many claims as they could.

17 Garrison guys had abandoned that strategy before I got  
18 there. They were now back to a strategy where they only  
19 resolved claims as they came to them. They didn't go out  
20 looking to resolve inventory settlements.

21 And they had the approach that we talked about, sort of  
22 the hybrid approach where you would obviously settle most of  
23 the cases. That was the only thing that was economically  
24 feasible.

25 But you would try cases and win cases from time to time

1 to keep those settlement costs down -- to keep the settlement  
2 amounts down, even though in an individual case it would cost  
3 you more to try the case than it would have to settle the  
4 case.

5 Q. Now when you shifted from this practice of settling  
6 larger number of cases to settling cases on a more individual  
7 basis, did that not run up your cost?

8 A. Sure. It involves higher costs in those cases that you  
9 spend money on prior to settling, you're spending more costs.  
10 There are higher costs. You still try to settle cases as  
11 early as you can. You just got to demonstrate that you can --  
12 that you are willing to try some. And you're willing to go to  
13 trial. As long as the settlement demands stay where they had  
14 been, you still settle cases very early.

15 When cases are selected to try to get the amount up by  
16 the plaintiff's firms, sometimes you have to try those.

17 Q. So you were looking at the overall cost of resolution?

18 A. Oh, sure. It was all about cash flow. It was all about,  
19 how do we resolve these cases for the lowest amount, total  
20 amount we can resolve the cases.

21 It wasn't about -- it wasn't about liability. It wasn't  
22 about the kinds of claims. It wasn't until reform that we  
23 made much of a stink -- we just paid a little bit higher  
24 amount for mesothelioma claim than we did for a lung cancer  
25 claim, and a little higher amount for a lung cancer claim than

1 a nonmalignancy claim.

2 But it was all about resolving claims, and it was all  
3 about cost avoidance.

4 Q. Now, we heard a lot in this court about the bankruptcy  
5 wave. I think the court first heard about it in our  
6 information brief back in 2010.

7 Can you briefly describe to the court what was going on  
8 when you arrived in terms of the changing of the litigation  
9 with the bankruptcies?

10 A. Sure. As I said, I came on as a consultant in late  
11 summer, early fall of 2001, and became general counsel at  
12 EnPro in 2002. So you see there was something that was a big  
13 change that was undergoing at that time -- that was ongoing at  
14 that time, excuse me.

15 The companies in red here had been the principal  
16 companies for quite some time, asbestos litigation paying the  
17 lion's share of the settlements, and included a lot of the  
18 companies we talked about who manufactured products that they  
19 acknowledged were dangerous that included asbestos insulation,  
20 friable -- dangerous friable products. Companies like  
21 Pittsburgh Corning, Owens Corning. Owens Corning made Kaylo  
22 insulation. Pittsburgh Corning made Unibestos insulation. WR  
23 Grace.

24 Anyway, the companies that had been paying -- involved in  
25 the largest numbers of trials, paying the largest amount of



1 claims, defending the cases and paying the largest amount,  
2 they had filed for bankruptcy in 2000 and 2001.

3 And you see, one reason it was called a bankruptcy wave,  
4 and a lot of people refer to it that way is when they filed,  
5 it caused lots of companies to file. In fact, I think on that  
6 chart there may be as many as 70 companies who filed for  
7 bankruptcy in that time period.

8 Q. Was Garlock often sued in cases where the company's in  
9 red?

10 A. Yes. I mean, as we talked about, the captions in those  
11 cases went on for pages and pages. And remember, we talked  
12 about how Garlock products were in the same locations as  
13 asbestos insulations. So Garlock was co-defendant with those  
14 companies that made the dangerous insulation products.

15 All those cases prior to the bankrupts -- obviously once  
16 they filed for bankruptcy they couldn't be sued in those  
17 courts anymore, so they were no longer on the Complaints.

18 Q. You've seen the pictures of the engine room of the ships  
19 with the big piping systems and all that, pipe covering and  
20 insulation and all that?

21 A. I have.

22 Q. So a lot of these companies actually made those products,  
23 right?

24 A. Yeah. The companies that we were talking about, and even  
25 more than that Armstrong, Turner Newell. The ones I was most

1 familiar with pretty early were Pittsburgh Corning and Owens  
2 Corning because of Kaylo and Unibestos, cause they were pretty  
3 well known names for friable insulation.

4 Q. So bankruptcy swept a bunch of companies into Chapter 11  
5 themselves. What impact did it have on Garlock?

6 A. Well, the immediate impact was because those companies  
7 were no longer being named and because they had -- their  
8 money -- their settlement monies had been taken off the table  
9 when they filed for bankruptcy. The immediate reaction for  
10 the remaining defendants including Garlock was that you have  
11 to pay more. That your settlement amounts have to go up  
12 because those companies are no longer paying settlements.

13 Q. But Garlock still had its defenses, which as you  
14 indicated before were implemented with high degree of success?

15 A. Right. We didn't think the success rate was going to  
16 change. We knew the costs were going to change.

17 Remember what I said earlier, when you start getting  
18 higher demands, you have to choose to pay those higher demands  
19 or you choose to try the cases. The cases they specially  
20 selected to get higher dollars on you, and if you tried them,  
21 you're going to spend a lot of money defending those cases.

22 In fact, the cost of the defense went through the roof  
23 because -- and I think we'll get to this later, but just to  
24 tell you the main reason why they went through the roof is,  
25 prior to the bankruptcies, the claimant had been readily

1 acknowledging the fact that they worked around the asbestos  
2 insulation. Talked about -- we heard some talk about  
3 snowstorms.

4 Whether they remembered or whether their memories were  
5 implanted, they remembered the names of the products that they  
6 worked around. They always knew Kaylo. They always knew  
7 Unibestos. All of a sudden now they weren't naming those  
8 companies anymore. They weren't in the caption. They weren't  
9 part of the lawsuit.

10 While claimants might describe insulation sometimes, they  
11 couldn't remember products. We had difficulty getting judges  
12 to allow them on jury forms from time to time.

13 So the cost of defending went up, it escalated. Garlock  
14 started hiring experts, Your Honor, like Captain Wasson to  
15 come into the courtroom and explain to the court and to juries  
16 how that insulation was there in the same location with its  
17 gaskets. And so obviously that cost considerable dollars, the  
18 costs of defense went up tremendously.

19 Q. Focusing back on what Garlock actually did in the  
20 courtroom to convince juries that its product had not caused  
21 the disease of a plaintiff, what impact would the absence of  
22 that evidence have on Garlock in a jury -- in the eyes of a  
23 jury?

24 A. Well, you know, I guess that would depend, Mr. Cassada.  
25 The impact it would have on a jury -- Garlock -- when Garlock

1 went to trial, the way it tried its case was sort of in two  
2 phases.

3 The first phase was -- first of all we'll demonstrate to  
4 the jury that Garlock's product didn't cause any damage. And  
5 for a lot of jurors that was enough. They would see that  
6 Garlock's product -- they would say the same thing I said.  
7 It's a gasket. It didn't cause disease. It's not  
8 responsible. A lot of juries -- jurors were like that.

9 And you see on that chart, even in that environment,  
10 Garlock was able to win 64 percent of the cases that it took  
11 to verdict.

12 Q. You're now looking at the 2000s?

13 A. I am, the 2001 to 2010.

14 But a lot of jurors wanted more than that. They wanted  
15 to know -- they would say, okay, I can see that your product  
16 wasn't dangerous. It probably didn't cause any disease.

17 But I'm here as a fact finder. I want to find out what  
18 did cause the disease. I want to walk away here knowing that  
19 I made a determination on what caused the disease.

20 Now before 2000/2001, as I said before, those companies  
21 had been sued. They were readily identified. The claimant  
22 acknowledged the fact that the claimant was exposed to those  
23 products.

24 After 2001, in some cases, that evidence was no longer  
25 readily available. Particularly in the cases that the

1 plaintiff's lawyers were using to drive up the settlement  
2 averages.

3       Look, all throughout Garlock's history, including this  
4 time period, it resolved 82 percent of the mesothelioma claims  
5 against it with payments of \$25,000 or less. For the whole  
6 time period of its resolving claims, 82 percent for that. But  
7 sometimes claimants would demand much higher payments. And in  
8 those cases, it was very important what that exposure evidence  
9 was.

10       So Garlock had to be able to demonstrate not only that it  
11 didn't cause the product, but it needed to demonstrate -- I'm  
12 sorry -- that it didn't cause the disease. It needed to also  
13 be able to demonstrate what products did cause the disease.

14       That's what I talked about earlier when I talked about  
15 hiring Captain Wasson, hiring private investigators, doing  
16 what it needed to do to try to demonstrate what products  
17 caused the disease if the claimant wasn't willing to  
18 acknowledge that.

19       Again, I'm not here to say that that was happening in a  
20 large majority of the cases. It was happening in these driver  
21 cases that were being taken to the jury to drive up -- it was  
22 still about settlements. It was still about the plaintiff's  
23 lawyers figuring out how they could get the highest  
24 settlements from Garlock. Garlock trying to pay the lowest  
25 cost avoidance settlements that it could pay.

1           And the reason that they were -- and, you know, Mr.  
2 Swett, in his opening, put up a chart that showed what a low  
3 percentage of Garlock's mesothelioma cases we were talking  
4 about in the request for what's known as the RFA cases, these  
5 cases about suppression. But what he didn't say is the  
6 percentage of cases that were worked up for trial that  
7 weren't, you know, that were even subject -- that was also  
8 very low.

9           Again, Garlock in its whole entire history, paid more  
10 than \$250,000 in 250 cases. It paid more than \$250,000 in 250  
11 cases.

12           So that makes the 203 or whatever it is on that RFA list  
13 look like a pretty high percentage.

14 Q.   Now, you described a concept of "driver cases". You said  
15 earlier that you would try cases when a move was made to try  
16 to force Garlock -- or compel Garlock to pay higher  
17 settlements. Is that what a driver case is?

18 A.   Well, a driver case would be a case that the claimants  
19 would focus -- the plaintiffs' lawyers would focus on, target  
20 Garlock on, threaten to take it to trial to get a verdict to  
21 try to drive higher settlements. That would be how -- what we  
22 would refer to as driver cases. It was trying to drive the  
23 settlement amounts up. That was just our name for them,  
24 driver cases.

25           And then if they could create a perception of liability

1 for Garlock in those cases, they would use that case to drive  
2 settlements across a wide number of cases.

3 In other words, we want to settle our whole trial list  
4 for this year. We're going to take you to trial on this case  
5 and get you a verdict unless you agree to pay us higher  
6 settlement amounts on all our cases for this year.

7 Of course that's the way Garlock looked at it too. If  
8 I'm going to settle this case to avoid the cost at a higher  
9 amount, I would sure like to settle a group of cases so I  
10 don't have expenses in those cases. And they demonstrated  
11 that they could make a driver case out of some of these cases.

12 Q. Now we heard a statement in the opening arguments by -- I  
13 believe it was Mr. Guy, I think, talking for the futures  
14 representative -- something to the effect that a pipefitter  
15 who was -- developed disease in 1995, was exposed in the same  
16 environments to the same products as a pipefitter who may have  
17 developed disease in the 2010s. Is that more or less a true  
18 statement?

19 A. It is. It is. In fact, that's what I'm saying. That's  
20 what we're talking about.

21 The pipefitter in 1995 who was acknowledged that he had  
22 been exposed to all this insulation and was readily  
23 acknowledging the names of those companies, was the same  
24 pipefitter, a different pipefitter, but it was in the same  
25 job, doing the same things as the pipefitter in the 2005s who

1 was not so forthcoming about those exposures.

2 So the claimant -- the cause of the disease was still  
3 evident to us. The case just looked different the way it was  
4 presented by the claimant's lawyers.

5 Again, that was in the cases that they tried -- that they  
6 used as driver cases to try to drive up the settlements where  
7 they targeted Garlock, and suppressed -- whether it was  
8 through fraud, which I believe probably happened in some  
9 cases. Different kind of implanted memory which happened in  
10 some cases. The claimant not remembering, which happened in  
11 some cases, I'm sure, or for any other reason. It was just a  
12 different looking case because the information available of  
13 exposures had changed, for whatever reason.

14 Q. Does it matter to you and to Garlock what -- why the  
15 evidence disappeared?

16 A. It doesn't to me, I mean. And we'll talk at some point  
17 here about why -- I believe the bankruptcy court -- and we can  
18 fashion a remedy that solves that problem that doesn't have to  
19 have anything to do with the motives, the rationale. Because  
20 in a plan of reorganization, all those disclosures can be  
21 required to be included. All the known exposures can be  
22 required to be included.

23 In that environment, the settlements would look a lot  
24 more like they looked in 1990 -- Mr. Guy's pipefitter in 1995,  
25 than they would look like in the 2005 to 2010 time period.



1           In fact, another analogy that was used -- that Mr. Swett  
2       used in his openings that he attributed, I believe, to  
3       Mr. Finch, was about a baseball analogy, about what period you  
4       use. And if you're going to predict the batting averages for  
5       the next years, you would look at the recent period batting  
6       averages.

7           And it immediately made several people who were baseball  
8       fans like me think, what if you used the home run totals and  
9       the batting averages in the steroids period, to try to predict  
10      what the batting averages -- when there's clearly things that  
11      aren't representative going on because people are cheating.  
12      Because in that same period the ball was juiced, use that to  
13      predict what's going to happen in the absence of that, on  
14      something very, very different.

15          This was going to be the last slide, but I wanted to  
16      cover it before we left the day and we'll go back and pick up  
17      what we skipped.

18          But the great thing about what can happen in this  
19      bankruptcy court, is that it can -- is that the court can help  
20      us with a solution. There's a plan that provides a solution.

21          The court can require in its case management orders and  
22      other parts of the plan, transparency about all nonexposures.  
23      Again, for whatever reason they weren't disclosed. We know,  
24      and that pie chart shows that they weren't disclosed.

25      Q.     That's happening in some courts today. The courts are

1 requiring claimants --

2 A. It is. And that's changing. And Mr. Behrens will  
3 testify about that at some point, about what's changing in the  
4 tort system.

5 But certainly the bankruptcy court can require that those  
6 be disclosed. And instead of having 19 nondisclosed claims  
7 for whatever reason, and two disclosed claims that we were  
8 getting, all of a sudden in the bankruptcy you get all 21  
9 disclosed claims. You know what that case really looked like.  
10 You know that that pipefitter in 2010 was just like that  
11 pipefitter back in 1995.

12 And what else the bankruptcy court can do is, can take  
13 this huge pressure of cost avoidance off, by having  
14 streamlined resolution provisions that eliminate excessive  
15 costs and expenses that are happening in torts.

16 You know, the first Rand report that came out, the report  
17 on asbestos litigation, demonstrated that less than 40 percent  
18 of the amounts paid in asbestos litigation actually went to  
19 claimants.

20 In a plan like this, just like the Fair Act would have  
21 provided on a national solution that the Supreme Court sort of  
22 begged for, a plan of reorganization can do the same thing.  
23 It can eliminate much of the cost and expense and provide that  
24 the money go to the claimants.

25 So what we had an opportunity to do, is provide

1 expeditious and fair payments for mesothelioma claimants who  
2 actually had identified contact with Garlock products, who  
3 actually had exposure.

4 I think we saw in Mr. Henshaw's slides, a good picture of  
5 what that was. The exposure groups one, exposure groups two.  
6 Yes, they had lots of other exposures. In environments where  
7 they demonstrate those exposures, their claim values would  
8 look like they did in the 1990s. But they also had Garlock --  
9 they also had contact with the Garlock product. And if we  
10 focus on those groups and pay them some resolutions like we  
11 were paying prior to the steroids period, as I'll refer to it,  
12 than the \$270 million that Garlock's proposed in its plan  
13 is -- would more than provide sufficient funds to provide  
14 compensation to those claimants on a level well above what it  
15 was paying in the 1990s.

16 MR. CASSADA: Your Honor, I think we're at the  
17 witching hour.

18 THE COURT: All right. Why don't we --

19 MR. SWETT: Your Honor, I have an application.

20 MR. CASSADA: We'll pick back up with Mr. Magee  
21 after the committee and FCR put on their science case early  
22 next week. We assume that will be Thursday morning.

23 MR. SWETT: May it please the court, between now and  
24 Thursday I would ask that the court direct Garlock to produce  
25 the major expense project approval forms, with respect to each

1 case on the RFA list one. We have 26 of those.

2 In the testimony that you have just heard, Garlock  
3 has unequivocally, without any question, waived the  
4 attorney-client privilege in the work-product doctrine with  
5 respect to the reasons for settling the rest of those cases.

6 Mr. Magee expounded, as the chief legal officer of  
7 the company, his view of why in fact Garlock settled those  
8 cases. That is the basis upon which you previously directed  
9 the production of the MEA forms.

10 And I'm going to set aside and not request the trial  
11 evaluation forms, because they're not that informative.

12 But on the very same basis you directed him to  
13 produce the 26, he has now extended his theory, he's pushed it  
14 to the edge. He's attributing those reasons to all 204 cases,  
15 and he needs to be subjected to searching cross-examination,  
16 which cannot be done without contemporaneous evidence of why  
17 in fact they settled the cases.

18 So I ask you to extend your previous waiver ruling,  
19 and to direct Garlock in the period between now and next  
20 Thursday when Mr. Magee returns to the stand, to produce the  
21 MEAs with respect to all of the remaining 204 cases on RFA  
22 list one.

23 Thank you, Judge.

24 THE COURT: Do you want to respond to that?

25 MR. CASSADA: Your Honor, that is completely without

1 basis. Mr. Magee's giving testimony that's consistent with  
2 the position that Garlock's taken from the beginning of this  
3 case.

4           Moreover, Your Honor, we haven't been allowed full  
5 discovery on anything more than the cases that -- 15 full  
6 discovery cases that the court knows about here. It was on  
7 the basis of those cases where we had that discovery and we  
8 were making the argument that the court had previously made  
9 the rulings with respect to waiver of privilege and production  
10 of documents.

11           Finally, if Mr. Swett wants to make an application,  
12 he should file papers and give us a chance to respond after he  
13 states the precise basis for his position.

14           MR. SWETT: This point has been briefed and  
15 rebriefed.

16           THE COURT: He already has. Tell you, I think I  
17 ought to do that, partly because I think Mr. Magee's testimony  
18 is important. And it will have more weight if subjected to  
19 that kind of cross-examination, and we'll just see.

20           So let's say by the end of the day Tuesday you all  
21 get together all the MEAs you can of those ones you haven't  
22 already given them of the 204. And that will not be a waiver  
23 of anything else, and we will go from there.

24           MR. CASSADA: Your Honor, could -- it would help if  
25 we could get explained more precisely the exact basis for the

1 ruling.

2 THE COURT: The ruling is because I think the  
3 waiver's been -- there's been a waiver of attorney-client  
4 privilege as to those matters by his testimony, that's the  
5 legal basis.

6 The practical basis is that I think his testimony is  
7 important, and that it will be -- that it ought to be subject  
8 to cross-examination. If it survives that, it will be more  
9 valuable to you; if it doesn't, it will be more valuable to  
10 them.

11 At least we won't have the argument of, we would  
12 have shown that to be a bunch of bull, but you didn't give us  
13 a chance to do it.

14 So we'll just see where it comes out. But I believe  
15 what he says is important, and it goes to the heart of what  
16 we're doing.

17 MR. CASSADA: Okay. Which cases are we talking  
18 about?

19 THE COURT: We're talking about the RFA cases, I  
20 think we've called them. There's what, 204 of them, and of  
21 those you've already given him some MEAs, so you don't have to  
22 do that again.

23 MR. CASSADA: Well, I think we've given them for 26  
24 cases. I have to look into it to see if it's even possible to  
25 get those together by Tuesday.

1 THE COURT: Well, let us know Monday what problems  
2 you have, and just do the best you can with it.

3 MR. CASSADA: Thank you.

4 THE COURT: I understand you got a lot going on.  
5 But do the best you can with it.

6 MR. CASSADA: Okay. Thank you. We will. Thank  
7 you.

8 THE COURT: We'll come back Monday at 9:30.

9 Do we know who's going to testify then?

10 MR. SWETT: Your Honor, the order of witnesses was  
11 served. I can pull it out of my briefcase to tell you, but  
12 the committee will turn to its witnesses on science topics.

13 THE COURT: Okay.

14 MR. CASSADA: Are we going in the order on the  
15 notice?

16 MR. SWETT: Yes. Yes. As far as I know. And I  
17 have no reason to believe otherwise.

18 THE COURT: Okay. Good.

19 MR. CASSADA: Will you check and let us know?

20 MR. SWETT: Yes.

21 THE COURT: And the courtroom will be open for all  
22 of that.

23 See you Monday morning.

24 (The hearing concluded at 5:30 p.m.)

25 \* \* \* \* \*

1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF NORTH CAROLINA  
3 CERTIFICATE OF REPORTER

4 I, Laura Andersen, Official Court Reporter, certify  
5 that the foregoing transcript is a true and correct transcript  
6 of the proceedings taken and transcribed by me to the best of  
7 my ability.

8 Dated this the 1st day of August, 2013.

9 s/Laura Andersen  
10 Laura Andersen, RMR  
11 Official Court Reporter  
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Laura Andersen, RMR 704-350-7493